

***United States Court of Appeals
for the Second Circuit***

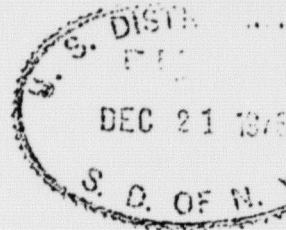


APPENDIX

77-7064

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- X
MADAN GAUTAM,

Plaintiff,

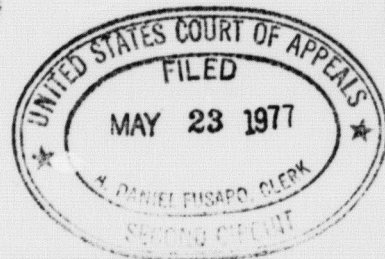
76 Civ. 2766 (Pro Se)
(WCC)

- against -

FIRST NATIONAL CITY BANK, et al.,

Defendant.
----- X

MEMORANDUM
AND ORDER



A P P E A R A N C E S :

APPENDIX

MADAN GAUTAM
Plaintiff, Pro Se
420 West 119 Street
New York, New York 10027

PROSKAUER ROSE GOETZ
& MENDELSON, ESQS.
Attorney for Defendant
300 Park Avenue
New York, New York 10022

JOHN M. LEWIS, ESQ.,
Of Counsel

CONNER, D. J.:

The subject of the above-captioned pro se action,
instituted under Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000e et seq., is an alleged employment discrimi-
nation unlawfully based on national origin. Plaintiff, an
East Indian, founds his claim for damages and other relief

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upon defendant's 1974 rejection of his application for employment. Defendant has moved to dismiss, pursuant to Rule 12(b)(6) F.R.Civ.P., on the ground that the instant action is barred by the terms of Section 706(e), 42 U.S.C. § 2000e-5(e).

At the outset, it must be noted that the parties' submissions on the present motion are addressed to factual matters extending well beyond the terse recitals in the amended complaint at bar. So far as they are relevant to the issue now under contest, the parties' affidavits and exhibits will not be excluded from present consideration. Accordingly, defendant's motion, notwithstanding its label, has been effectively converted into an application for summary judgment under Rule 56 F.R.Civ.P. See Rule 12(b) F.R.Civ.P.

The standards against which such a motion must be measured are as rigorous as they are familiar. Thus, on a Rule 56 motion, a Court is obliged to resolve any ambiguity -- and to draw all reasonable inferences -- in favor of the party against whom summary judgment is sought. (United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).) Moreover, as Rule 56(c) expressly prescribes, summary judgment may be granted only if "there is no genuine issue as to any material fact." Therefore, in the assay of a Rule 56 motion, it is the office of the Court not to adjudicate issues of fact but rather to ascertain only whether such issues exist. Heyman

v. Commerce & Industry Insurance Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975); Empire Electronics Co. v. United States, 311 F.2d 175, 179 (2d Cir. 1962). And it is the moving party's burden to demonstrate the absence of material facts genuinely in dispute. Adickes v. Kress & Co., 398 U.S. 144, 157 (1970). Furthermore, a Court must take pains to assure that a claim is not lost to an uncounselled plaintiff merely because the facts that give it substance and context are not artfully disclosed. Cf. Haines v. Kerner, 404 U.S. 519 (1972); Jackson v. Statler Foundation, 496 F.2d 623, 625-26 (2d Cir. 1974).

I.

So far as is relevant here, the undisputed facts are as follows. On May 16, 1974, plaintiff visited defendant's Professional Recruitment Office in the hope of securing a position with defendant. After a brief exchange with a personnel officer, plaintiff submitted his resume for defendant's consideration and left the premises. After the passage of several months without response from defendant, plaintiff once again submitted his resume through a mailed application for employment. The application was received by defendant's personnel office on August 7, 1974. On that same day, a letter of reply was mailed to plaintiff, advising that, "[U]pon reviewing our present personnel needs in the light of your interests and background, we have come to the reluctant conclusion that we cannot, at this point, encourage you in your employment search."

On October 18, 1974, plaintiff filed a verified complaint with the New York State Division of Human Rights, charging defendant with unlawful discrimination and citing as the basis for that charge defendant's August 7, 1974 rejection of his application for employment. On December 6, 1974, the state commission issued a "Determination and Order after Investigation," dismissing the complaint in the absence of probable cause to support plaintiff's charge that defendant's refusal to hire him constituted an unlawful discriminatory employment practice. That determination was affirmed by the New York State Human Rights Appeal Board, in a Decision and Order dated June 30, 1975 and received by plaintiff in January 1976.

On February 23, 1976, plaintiff filed with the Equal Employment Opportunity Commission [the EEOC] a charge that, in essence, echoed his complaint before the state commission; through apparent oversight, the EEOC did not notify defendant of the charge pending against it or, for that matter, of its ultimate disposition. On March 29, 1976, the EEOC issued its Determination, which consisted of the conclusions that (1) "the timeliness, deferral and all other jurisdictional requirements" under Title VII had been satisfied and (2) there was not "reasonable cause to believe that the charge" lodged by plaintiff was true. Within ninety days from receiving notification of the EEOC Determination, ^{1/} plaintiff filed his complaint in this district.

II.

Defendant's motion rests on the Section 706(e) prescription that,

"in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, [a] charge [under 42 U.S.C. § 2000e-5] shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier * * * ." (emphasis added).^{2/}

As noted above, plaintiff filed his charge with the EEOC on February 23, 1976. Defendant urges that the allegedly "unlawful employment practice" for which plaintiff has sought redress from the state and federal agencies, as well as from this Court, occurred no later than August 7, 1974, with defendant's rejection of plaintiff's application for employment, i.e., more than three hundred days before the filing of plaintiff's Title VII charge with the EEOC. Plaintiff counters with the assertion that the accused discrimination has continued from 1974 to the present and that the limitation bar proposed by defendant is therefore inapplicable to this case. For the reasons discussed below, this Court is impelled to the conclusion that the claim herein, however characterized by plaintiff himself, was not timely filed with the federal agency.

Precedent instructs us, to be sure, that a discriminatory employment practice, policy, or device that exerts a continuous force, resulting in a present impact at the time of an EEOC filing, tolls the running of the Section 706(e) limitation period and may thus preserve a Title VII claim that would otherwise be stale. See, e.g., Egelston v. State University College at Genesco, Docket No. 76-7047 (2d Cir. June 7, 1976); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973); Bartmess v. Drewrys U.S.A. Inc., 444 F.2d 1186 (7th Cir.), cert. denied, 404 U.S. 939 (1971); Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973), appeal dismissed, 496 F.2d 1094 (2d Cir. 1974). Indeed, the suspension of the limitation period by force of an alleged continuing discrimination is perhaps "particularly applicable in cases involving discriminatory failure to hire * * * [,] for in such circumstances, 'it would seem to be a needless, futile gesture to require [the] plaintiff to make a formal reapplication for the desired position, simply because the EEOC complaint was not filed within [180 or 300] days of the initial application'." Stroud v. Delta Airlines, Inc., 392 F. Supp. 1184, 1189 (N.D. Ga. 1975), quoting Cisson v. Lockheed-Georgia Co., 392 F. Supp. 1176, 1181 (N.D. Ga. 1975).

It is equally true, however, that an isolated refusal to hire does not of its own constitute a continuing discrimination. Molybdenum Corp. v. EEOC, 457 F.2d 935 (10th Cir. 1972); Kohn v. Royall, Koegel & Wells, supra, at 518. Thus, a refusal to

hire that does not "form[] one item in an ongoing series of violations * * * that are by definition 'fresh'," Kohn v. Royall, Koegel & Wells, supra, at 518, cannot support an invocation of the tolling theory outlined above. Cf. Griffin v. Pacific Maritime Association, 478 F.2d 1118, 1120 (9th Cir. 1973).

Plaintiff's own submissions on this motion establish that the grievance underlying the present action has, from the outset, resided solely in a discrete and completed instance of purported discrimination. This is not to ignore plaintiff's previous and present assertions that the discriminatory action of which he now complains has been a "continuing" violation of civil rights. However, it is perhaps enough to note that "the insertion of the word 'continuing' in an EEOC complaint, without more, does not raise a per se claim of continuing discrimination." Stroud v. Delta Airlines, Inc., supra, at 1189. See Moore v. Sunbeam Corporation, 459 F.2d 811, 828-29 (7th Cir. 1972). What may be noted in addition, however, is even more to the present point: plaintiff's own explanation of his references, in both his EEOC charge and his present complaint, to a continuing discrimination by defendant.

Thus, according to plaintiff's own lights, defendant's 1974 refusal to hire has continued to impact upon plaintiff at least to the extent that he remains unemployed to date.^{3/} However, as another court has observed in an analogous context,

"Once a disparaging remark is made or a transfer is denied, or a demeaning work assignment is given" -- or, indeed, an application for employment is rejected -- "it is, without more, a completed and isolated act; such practices" -- however long-lasting their repercussions may appear from the subjective viewpoint of the aggrieved -- "do not give the Plaintiff a perpetual right to file charges before the EEOC." Loo v. Gerarge, 374 F. Supp. 1338, 1340 (D. Ha. 1974); see Collins v. United Air Lines, Inc., 514 F.2d 594, 596 (9th Cir. 1975).

Equally unavailing to plaintiff is his suggestion that defendant had, subsequent to its August 1974 letter, rejected his employment application anew. In asserted support of that proposition, plaintiff cites (1) defendant's alleged rebuff of his "formal request" for a job during a November 1974 conference with the Regional Director of the State Human Rights Division and (2) a March 1975 exchange between plaintiff and defendant's attorney, a correspondence reflected in two letters that are quoted in full in the margin.^{4/}

Argument's sake will allow the assumption that rejection of a settlement proposal extended during the course of an agency proceeding may be the equivalent of a discriminatory refusal to hire. It may even be assumed, again arguendo, that the March 1975 letters can plausibly be construed as an employment application by plaintiff and a discriminatory rejection thereof by defendant. The critical fact remains,

however, that the discriminatory acts thus identified by plaintiff occurred more than three hundred days before the filing of plaintiff's EEOC complaint.

As has been noted above, the EEOC for its part determined that its process had been timely invoked by plaintiff. This Court is not unmindful that "the EEOC's findings are ordinarily entitled to great weight," Weise v. Syracuse University, 522 F.2d 397, 413 (2d Cir. 1975). Nevertheless, although the EEOC finding of timeliness might normally stand as a formidable hurdle to success of the present motion, that hurdle is not necessarily insuperable -- i.e., the agency's determination does not perforce conclude the matter here. See Weise v. Syracuse University, supra, at 413; Macklin v. Spector Freight Systems, Inc., supra, at 986.

In the present case, the EEOC clearly was swayed overmuch, or rather inferred more than was intended, by plaintiff's conclusory reference in his formal charge to a "continuing" discrimination on the part of defendant. Moreover, "the matters the Commission proceeds to investigate should assist in determining the scope of the complaint for purposes of applying" the provisions of Section 706(e), Macklin v. Spector Freight Systems, Inc., supra, at 988. Such guidance hardly aids plaintiff in the present case. The EEOC determination did not derive from an independent investigation by the federal agency. Rather, the agency's decision rested squarely upon the record developed by the state commission -- a record that, in turn, did not

extend beyond a narrow inquiry into defendant's employment practices as of 1974. Furthermore, the EEOC conclusion respecting the timeliness of plaintiff's charge is inevitably cast in shadow by the agency's failure to advise defendant of the pendency of plaintiff's charge -- a divergence from the ordinary course of EEOC proceedings, see 42 U.S.C. § 2000e-5(b) -- and the consequent absence of possibly relevant input from defendant. Cf. Kimelman v. Talley Industries, Inc., No. 75-Civ. 5482 (S.D.N.Y. September 28, 1976).

III.

One final aspect of the present motion must be mentioned, if only to demonstrate that it has not been overlooked. Defendant appears to be wholly confident that the provisions of Section 706(e) establish preconditions to this Court's jurisdiction. However, as at least one other court has noted, such proposition -- i.e., that compliance with the limitation terms of Section 706(e) is an absolute jurisdictional prerequisite -- has a precedential support that may well be more apparent than real. See Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975); Equal Employment Opportunity Commission v. Nicholson File Company, 408 F. Supp. 229 (D. Conn. 1976).

The matter remains, in any event, a "still-open question" in our own circuit. Egelston v. State University College at Genesco, supra, at 4031 n.5. But cf. DeMatteis v. Eastman Kodak

Company, 511 F.2d 306, 309 (2d Cir. 1975). The ultimate resolution of that question does not practically concern us here: whether the time requirement at issue be regarded as jurisdictional or, rather, as in the nature of a statute of limitations, the disposition of the present case must be the same. For, even if the three-hundred-day period be viewed in the latter light, there is here nothing to recommend a resort to equitable principles, such as those suggested in Reeb,^{5/} that might spare plaintiff's complaint from dismissal.

Title VII may indeed be unhappily "rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced lawyer," much less the layman, Egelston v. State University College at Genesco, supra, at 4029. Nonetheless, the time requirements set by Congress were purposefully designed to safeguard defendants, as well as the interested agencies and courts, against stale claims. As for Title VII claimants, due diligence can generally serve as an effective safeguard against untimeliness for persons "with a reasonably prudent regard for [their] rights." Reeb v. Economic Opportunity Atlanta, Inc., supra, at 930. In the present case, according to his own narrative, plaintiff regarded himself as the object of defendant's discrimination at least as early as August 1974. This Court has no license to accommodate plaintiff's claim by blinking either at that fact or at the limitation period defined by Congress.

Defendant's motion to dismiss is granted.

SO ORDERED.

William E. Conner
United States District Judge

Dated: New York, New York

December 22, 1976

FOOTNOTES

1. Section 706(f)(1) provides:

"If a charge filed with the [EEOC] * * * is dismissed by the Commission * * * the Commission * * * shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * * ." 42 U.S.C. § 2000e-5(f)(1).

2. Where a complainant has not "initially instituted proceedings with a State or local agency," he must file his charge with the EEOC within 180 days after the occurrence of the alleged unlawful employment practice.

3. In an EEOC Affidavit form, plaintiff did cite his belief that defendant "is knowing[ly] and deliberat[ely] exploiting the foreign nationals by giving them a considerable less salaries [sic], and thus replacing the U.S. citizens, who naturally demand[] the going rates." It does not appear, however, that plaintiff's EEOC charge or his present action proposes to challenge defendant on that ground; nor would plaintiff appear to have standing to proceed on the strength of such allegation.

Moreover, revealingly enough, plaintiff's presently outstanding request for interrogatories reads, in relevant part, as follows:

"Names of the employees of Indian Nationals [sic] Origin hired by [defendant] with Masters degrees in Economics, Operations Research, Math before the Month [sic] May, 1974 and June 1974 * * *."

4. Plaintiff's letter to defendant's attorney reads as follows:

"resurrected § 1 of the Civil Rights act of 1866 ... and held that.. 42 U.S.C.A. § 1982 barred racial discrimination by private individuals in the sale or rental of housing."c.f. Sanders V. Dobbs Houses Inc. 431 F.2d 1097(5th Cir.1970), Cert.denied 401 U.S. 948(1971) accord: Caldwell V.National Brewing Co. 443 F.2d 1044(5th Cir.1971), Cert.denied 405 U.S. 916 (1972).

Employing the Jones V.Meyer logic,the Federal Courts have determined that § 1981's ban on racial discrimination in the making and enforcement of contracts prohibits"private racial discrimination in employment by companies and unions". See Waters V. Wisconsin Steel Works, .. 8 E.P.D. II 9658 (7th Cir.1974).42 U.S.C. § 1983 is the corollary of § 1981 for challenges to employment discrimination under color of State Law. Thus the employee or the prospective employee,who has suffered racial discrimination under Title VII or 42 U.S.C. § 1981., theoretically has a choice of remedies.See Guerra V. Manchester Terminal Corp. 350 F.Supp 529 (S.D.Tex.1972) aff'd in part 498 F.2d 641(5th Cir.1974).Whereas plaintiff concedes,that EEOC didnot notify the defendants,before the deliveryof the letter"Right to Sue,in the Federal District Court".The reason being,that primarily EEOC's power

lies to assist parties, in conciliatory process, to come to some agreement. When EEOC found the plaintiff's earlier efforts to secure a job or an equal opportunity, through the March 4, 1975 letter and telephone calls, to the defendant's attorney, Mr. Jossen, brought no results, it (EEOC) may be because of its short of manpower rescinded its conciliatory efforts. Regardless, "Letter to Sue" was inevitable, to the plaintiff, from the EEOC. The EEOC rightly inferred the nature of the "Discrimination", which was and is a continuous one, hence the "Letter to Sue" followed. The timeliness of filing the charge of alleged discrimination with the EEOC, is perfectly within the 300 days limit for the decision of the Appeal Board (which was an ex-parte) was rendered on June 30, 1975, and the charge with the EEOC was filed in Feb. 23, 1976, which is less than 240 days.

2. In the support of "Continuous Discrimination".

It is a long recognized Constitutional doctrine that "Sophisticated as well as simple-minded modes of discrimination" are prohibited. See *Lane v. Wilson*, 307 U.S. 268, 275, 59 S.Ct. 872, 876, 83 L.Ed. 1281 (1938) (Frankfurter J.). The scope of permissible continuous employment discrimination cases has been held to be rather broad, even in non-class action. In *McDonnell-Douglas Corp. v. Green*, 411 U.S. 972

-(1973), the Supreme Court ruled that in an individual action challenging the employer's assertedly legitimate grounds for refusal to hire as "pretextual," plaintiff is allowed to inquire into the employer's general policy and practice with respect to minority employment to determine whether plaintiff's experience"..... conformed to a general pattern of discrimination against blacks".

411 U.S. at 805. Again, it is now a settled law that if the alleged violation is deemed to be of continuous nature rather than a single, isolated act, the 180 or 300 days period established by 42 U.S.C.

§ 2000e-5(e) becomes irrelevant and the filing of the EEOC charge is permitted as long as the discrimination or discriminatory practices continue.

See, e.g., Griggs V. Duke power Co., 420 F.2d 1225 (4th Cir.1970), rev'd on other grounds, 401 U.S. 424(1971); Moreman V. Georgia Power Co., 310 F.Supp. 327(N.D. Georgia 1969); It is under the Civil Rights Act of 1964 § § 703(h) 706(g), 42 U.S.C.A. § § 2000e-2(h) 2000e-5(g), in the 4th circuit it was argued that relief may also be granted. Also see 407 F.2d 1047, 1052(5th Cir, 1969), Local 53 of International Association of Heat and Frost Insulators and Asbestos Workers V. Vogler .

See U.S. V. Local 189, 282 F.Supp. 39,44 (E.D.La. 1968), aff'd 416 F.2d 980 (5 Cir.1969). Quarles V. Philip Morris Inc. 279 F.Supp.505 ,516 (E.D.Va 1968). See U.S. V. Hays Int. Corp. 415 F.2d 1038(5th Cir.1969) (Sept.16,1969), See Quarles V. Philip Morris Inc. Supra 279 F.Supp. at 516.

Sect.706(g) of Civil Rights Act of 1964, injunctive relief under § 706(g) see Clark V. American Marine Corp. 304 F.Supp 603, (E.D.La.Sept.1969), Local 189 V. U.S. , 416 F.2d. 980(5th Cir.Jul.28, 1969). See Guinn V.U.S. 238 U.S. 347,354 S.Ct. 926,59 L.Ed. 1340 (1915).The opinion was unanimous. Goss V. Bd.of Education 373 U.S. 683, 83 S.Ct. 1405, 10L.Ed. 2d 632 (1963).

Courts have held ,that when the discrimination has been of a continuous nature as herein alleged , evidence of prior acts against plaintiff must be allowed to show the continuing pattern of discrimination,which has occurred and continued to occur within 300 day limit preceding the date,the complaint was brought.

Cox V. U.S.Gypsum Co., 409 F.2d. 289(7th Cir.1969)and Marquez V. Omaha Dist Sales Office, Ford Division 440 F.2d 1157(8th Cir.1971)

The motion to dismiss the complaint should have been denied where there are unresolved factual questions concerning the "continuing"

nature of the violation. See e.g., Belt V. Johnson Motor Lines Inc. 458 F.2d 443 (5th Cir. 1972); Bateman V. Retail Credit Co., 320 Supp. 1115 (N.D. Ga. 1970); Sciaraffa V. Oxford Paper Co., Supra; Tooles V. Kellogg Co., 336 F. supp. 14 (D. Neb. 1972).

See Caldwell V. National Brewing Co.; 443 F.2d 1044 (5th Cir. 1971)

Supreme Court has held that (w)hen faced with a problem of statutory construction, this court shows great deference to the interpretation given the statute by the offices (or) agency charged with its administration, "To sustain the commission application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings". Unemployment Compensation Commission of Territory of Alaska V. Aragon 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136.

See also e.g.; Gray V. Powell 314 U.S. 402 62 S.Ct. 326, 86 L.Ed. 301; Universal Battery Co.; V.U.S., 281 U.S. 580, 583, 50 S.Ct. 422, 74 L.Ed 1051. See Weeks V. Southern Bell Tel & Tel. Co. 408 F.2d 228 (5th Cir. 1969). Once again, where the complaint has properly alleged "continuing" discrimination and where the EEOC has accepted the complaint as timely filed (as is the case, currently vel-non) the preference is

to let the plaintiff have his or her day in court. See Nishiyana V. North American Rockwell Corp. 49 F.RD.288 (C.D.Cal.1970), in which the plaintiff alleged only that acts which preceded the untimely filing of the complaint were discriminatory.

There are instances, however when discrimination results from a practice (or) pattern of action that perpetuates the effects of prior discrimination. U.S. ^{by} Clark V. Dillon Supply Co.; 4th Cir. 429 F.2d 800 (July 8, 1970); Grigg V. Duke Power Co., 4th Cir. 420 F.2d 1225 Cert. Granted 399 U.S. 926, 90 S.Ct. 2238, 26 L.Ed.2d 791 (June 29, 1970) Robinson V. P. Lorillard, C-141-G-66, 2 F.E.D. cases 465 (M.D.N.C. 1970) U.S. by Clark V. Local 179, United Paper makers & Paper workers, 282 F.Supp 39 (E.D. La 1968) aff'd 5 Cir. 416 F.2d 980 (1969), Cert. denied. 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970). In these cases the discrimination is continuous and it is not necessary that charges be filed within the given time period (90 days). Extends discrimination into present. See Sciaraffa V. Oxford Paper Co.; 310 F.Supp. 891 (D.C. Me 1970). Cox V. U.S. Gypsum.

Plaintiff asserts, that considerable weight should be given to the timeliness filing of the charge with the EEOC, further claim of a continuing violation is a significant aspect of plaintiff's charge.

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Once more, for example, in Watson V. Limbach Co., supra the plaintiff challenged a test administered by the union's apprenticeship council which allegedly operated to exclude blacks from the union. Plaintiff filed his complaint with the EEOC in August 1968-- exactly a year after he was refused admission to the union ---but the District Court for the Southern District of Ohio denied defendant's motion to dismiss motion and held that:

"Since the complaint before us clearly alleges an on-going pattern of discrimination against plaintiff and his class, it is not necessary that plaintiff be in strict compliance with 2000e-5(d)
333 F.Supp. at 765"

See, also Culpepper V. Reynolds Metals Co., supra, Cox V. U.S. Gypsum supra; Tippett V. Liggett and Myers Tobacco Co., supra,
Sciarffa V. Oxford Paper Co., supra.

Lower Court erred in dismissing the complaint, by narrowly reading and thus interpreting Title VII, and hence encouraging the act of unlawful employment practices, already followed by the defendants.

It is not the practice itself, but its effect which took toll, continuously on the plaintiff, emotionally, physically, financially, and the continuous decline of prestige of the plaintiff, among his associates.

3. In Support of the Timeliness filing of the Charge with the EEOC.
Equal Employment Opportunity Commission, an arm of the Federal Government, was set up, both as an Investigatory and Enforcement agency. A brief interpretation of the federal agency, its power and limits, as mandated by the Federal Govt., are outlined here, for the convenience of the Hon'ble Judges of the Appeal's Court, for the Second Circuit, by the plaintiff. Despite the dual role of the EEOC, as an Investigatory and an Enforcement agency, it lacks the police power, to effect, its findings, on the charged party, generally the defendant, (could be an individual or a private corporation). Under Title VII, of the Civil Rights Act, 1964, the agency's experts investigate the charge brought by the aggrieved party (sometimes a tiny minority of the group of the minorities section--such as the Plaintiff, himself in this action .). This investigation could be on its own initiative, or of the charge filed with the state agency, of the State Human Rights Commission.

The EEOC would receive and assume jurisdiction over the charge, investigate the facts alleged in the charge, and make findings of fact.

On the basis of the findings, either the EEOC would convene a meeting, between the parties, and try to effect the settlement, or do nothing. EEOC has exclusive jurisdiction, on the facts finding mission and recommendations to the plaintiff as well as to the defendant, in the matter. Since the workload of the EEOC almost invariably precludes exhaustive investigation, Plaintiff would like to enlighten the Hon'ble Judges of the Appeal Court of the Second Circuit, at this point, after the letter "Right to Sue", was issued by the EEOC, on March 29, 76 plaintiff went back to the EEOC a dozen times (which can be substantiated by producing letters written, during that time), and asked the officials to help him get the job, and the back pay, from the Citibank, but in vain. It was not until June of 1976, when someone in the EEOC told me (or) the plaintiff, if the suit is not filed in the Federal Court, this whole matter will be doomed for ever. It was also stressed, that EEOC lacks the power to compel Citibank to hire the plaintiff. Plaintiff only interest was to get gainfully employed, and earn an honest and productive living. Plaintiff at the time of filing the suit with the Federal Court, was miserably illequipped, both with legal counsel, as well as with funds.

Again, when the defendant's counsel^u called the plaintiff for an extension of time^{to file the answer}, plaintiff immediate answer was to get to the settlement (that is he wanted the job, with the Citibank) and no extension of time.

Once again, in the matter of the EEOC, once the agency proceedings have given way to a law suit, both the initial charge and the results of the EEOC investigation (such as the filing of the "Charge" with the EEOC Timely, and continuing discrimination, by the defendant) may become important factors in the litigation. At this point, plaintiff would like to illustrate the fact, EEOC confirmed after its investigation "After having met the Timeliness requirements along with other^a requisites" plaintiff has^a right to sue the charged party". Both the Federal Courts and the Appeals Courts, have inherently given a great deference to the EEOC findings. As ill luck would have it, the lower court, of the Southern District, finding that the plaintiff is uncounseled, and without any means of support, rejected not only his own charge of "Continuing Discrimination", but also the charge of the EEOC, that the "charge was filed with the EEOC timely", thus casting a doubt on the verity of the competence and expertise of the EEOC's staff members.

Plaintiff made every possible efforts to persuade the defendants to hire him, but in vain. Markedly, when plaintiff filed his complaint before the Appeal Board of the State Human Rights Commission,

State of New York, defendant's attorney spent inordinate amount of time, to have the appeal dismissed, on grounds of timeliness and other jurisdictional matters. Plaintiff, at this time, after talking to the defendant's attorney Mr. Jossen, wrote him a letter, on March 4, 1975 asking him to settle the case, Exhibit 1-but the request was turned down. Discrimination and its effects continued. Even though, plaintiff did not make any fresh application, for job employment- it would have been entirely futile if not ridiculous for the plaintiff to have been forced to make repeated application for employment, doomed in advance-merely to fulfil a technical requirement. See Reeb V. Economic Opportunity Atlanta Inc; 5 Cir. 516 F.2d 924, 928. Reeb is not alone in allowing equitable considerations to toll the time limitations established by Title VII. See e.g. Culpepper V. Reynolds Metals Co. 5 Cir., 421 F.2d 888, 891; Antonopoulos V. Aerojet-General Corp., E.D. Cal., 295 F.Supp. 1390, 1395. The Reeb court's holding that the notice period was not jurisdictional in the strict sense was based on the arguments that (1) Since the complainants under the Act would most likely be laymen, they should not be held to the "technical rules of common law pleading" in filing their charges, (2) Title VII was remedial legislation and therefore entitled to a liberal construction; and

(3) Many of the cases calling the time limitation "jurisdictional" were suffering from a "conceptual confusion" since having labeled the requirement jurisdictional they proceed to toll the time limitation for Equitable Reasons. Tenth Circuit of the United States Court of Appeals, has also determined that under certain conditions the time period (180-day period) for filing the charges with the EEOC may be tolled. Sanchez V. Trans World Airlines Inc. 10 Cir. 499 F.2d 1107, 1108. See also Archuleta V. Duffy's Inc., 10 Cir. 471 F.2d -33 & n.1 (where the court referred to the time limitation for filing a civil action after receiving a right-to-sue notice from the EEOC as a "Statute of Limitations") "Many courts have labeled the filing requirements "Jurisdictional" but have treated them as analogous to statutes of limitations and subject to equitable modifications." Skoglund V. Singer Co. D.N.H., 403 Supp 797, 804. For example, a recent Fifth Circuit case held that section 626(d)(1) prerequisites were jurisdictional, but proceeded to outline several instances where the 180-day notice period might be tolled. Edwards V. Kaiser Aluminum & Chemicals Sales, Inc., 5 Cir. 515 F.2d 1195, 1198. In dictum the court suggested that the period might be tolled until an aggrieved employee obtained legal counsel or acquired an actual knowledge of his rights under the act. The court concluded, however that it need not determine whether tolling was

allowable because the plaintiff in that case had failed "to file notice with in the time limitation". Fifth court has further supported and determined that analogous time limitation in Title VII was not jurisdictional, but subject to modification. Reeb, supra. Courts have further modified their views, such as "Notice of intent-to-sue, requirements cannot be waived, the time limitation should be interpreted as being subject to possible tolling and estoppel.

See Dartt V, Shell Oil Co., CA 10, 539F.2d 1256 (1976). Evidently, plaintiff's case is very similar to that of Dartt V. Shell Oil Co. where plaintiff appealed to the Appeal Board, of the alleged act of discrimination, in Dec 1974, the ex parte decision (on the trial date plaintiff was not invited, but the defendants were) and order was delivered on June 30, 1975, but it was not mailed till seven months later, that is in Jan. 1976. In other words, the complaint's ex parte decision was not mailed till 365 days have passed. During this time plaintiff made several dozens of calls to the Appeal Board, and several personal visits, to find out what is keeping this whole matter from moving, but his all genuine efforts, spending his money on telephone calls, the continuing agony arising of the defendant's action of job discrimination, went waste. Plaintiff uncounⁿselled, lost in the complex web of getting justice, was facing perpetual deterioration of mind,

torture of passing time, found nothing, but constant rejection, even at the great halls of Justice, the Southern District, of the United States Court, New York, N.Y. It is this/lapse of time (365 days) (beyond the control of

the aggrieved party), that both the lower court as well as the defendant deemed fit to consider, and hence court moved to dismiss the complaint.

EEOC did not recommend it, for the time offiling the charge with the EEOC begin to toll, after June 1975 (June 30, 1975), hence the charge filed with the agency was timely, and all other requirements

accordingly met. It is the investigatory agency, [the Appeal Board] failed to inform or mail the decision on time, in the event 365 days statutory time lapsed is considered. In the Dartt V. Shell Oil Co;

10 Cir. reaffirmed, "We remain unconvinced that Congress intended the

the failure to file notice within the 180-day (if it an action under ADEA, and 300 day notice period, if it an action under Title VII) *

notice period to be an absolute bar to bringing an (ADEA or Title VII)

private action. Plaintiff takes the opportunity, referring citation given under the ADEA act.

Because of the similarities between the ADEA and Title VII of the Civil Rights Act of 1964, courts sometimes refer to interpretations

of provisions in Title VII for assistance in defining analogous sections of the ADEA. Moses V. Falstaff Brewing Corp. 8 Cir. 525 F.2d 92, 94; Curry V. Continental Airlines. 9 Cir. 513 F.2d 691, 693; Goger V. H.K. Porter CO., 3 Cir. 492 F.2d 13, 15.

The "ratio decidendi", however, Fifth Circuit held, of the leading cases dealing with timing requirements in general under the Act compels the conclusion that the ninety day requirement (amended in 1972 to 180-days, where, city and state has no anti-discrimination law, and 300 days, where city and state has its own anti-discrimination law) is not "jurisdictional" in the sense that compliance with it "vel non" determines the jurisdictional of the District Court, without respect to any of the other circumstances in a particular case. We accept the view that the requirement should be analogous to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them should also be applied here".

To summarize the opposition against the summary judgement, plaintiff pleads, great injustice will be done to the cause of justice, if he is not given his day in the court. Dismiss for failure of pleading to state a claim upon which relief can be granted, in an artful manner, citing all the past ~~xxx~~ cases, will be a drastic measure, to the cause of justice.

Congress didnot intend to condition a claimant's right to sue under Title VII on fortuitous circumstances (or) events beyond his control, which are not spelled out in the statute, (For example, when the action brought before the Appeal Board of the State Human Rights Commission, New York, in Dec. 1974, the decision was made on June 30, 1975-but it was till seven months after, it was mailed), thus on fortuitous circumstances, 300 days limit expired-which plaintiff didnot know. Plaintiff did not sleep on his right, but did wait, till he got the decision in the mail. See 495 F.2d 404.

From the above, it can ~~be~~ ^{be} very/well deduced, that had the decision of the Appeal Board timely, so would the filing of the charge with the EEOC. Supreme court and many a District Courts as well as Circuit Courts have held, as numerous cases have been cited above, that 300 day time period requirement, should not bar the suit, and where facts underlying are of great importance, see DeMatteis V. E. Kodak 511 F.2d 306, 309 (2nd Cir. 1975). Such technicalities are particularly inappropriate in a statutory scheme in which laymen (like plaintiff himself, in the present case) unassisted by trained lawyers,

Initiate the action. U.S. at 526, 92 S.Ct. at 618.

More recently, the court 5th circuit in Franks V. Bowman Trans. Co.

5Cir.1974, 495 F.2d 398, 402-406, Cert. Granted, 420 U.S. 989, 95 S.Ct.

1421, 43 L.Ed.2d 669, 1975 gave a liberal construction to the following
sattutory language of 42 U.S.C. § 2000e-5(e).

See Nishiyama V. North American Rockwell Corp. 49 F.2d.288 (C.D. Cal. 1970)

have taken such a position and excluded evidence of discrimination

occurring outside the 210 day portion. It would raise serious

questions of Constitutional magnitude--and be offensive to the

conscience of the court--were a court to deny an uncounselled

plaintiff a full and fair hearing on the merits of his claim for

no better reason than that a state agency had failed to accord him

due process of law. Devotion to technical requirement is particularly

inappropraiet in the context of employment discrimination proceedings

and the court should have excercised its sound discretion accordingly.

Again decision of the EEOC as to its jurisdiction should be accorded

substantial weight.

The defendants cannot have it both ways. If they wish to argue that EEOC determination was based solely on the record of State proceedings, then they must face up to the infirmity of actions of both the state and federal agencies. Otherwise, defendants must bear the heavy burden of overcoming the EEOC's decision that it had jurisdiction of the instant case. Again only in rare circumstances where a court should upset the finding of an agency that the subject matter of a complaint filed with it, falls within the scope of the statute that the agency was specifically set up to enforce. NLRB V. Hearst 322 U.S. 111, 64 S. Ct. 851 (1944). The finding of the Commission must be accepted if it has warrant in the record and a reasonable basis in law. The conflicting precedents cited by the District Court make it plain that the action of the commission was reasonable; hence it should be given the benefit of the presumption of regularity, which attends its determination.

This case presents particularly strong reasons for such intervention and falls squarely within the rationale of Dartt V. Shell Oil Co., 539 F.2d 1256 (10 Cir. 1976). Plaintiff relied in good faith on the belief that the New York State Human Rights Commission would proceed in a manner which would afford him due process of law.

Instead it failed to notify him of the hearing of his appeal--and heard it in ex-parte manner, totally inconsistent, with our system of justice. The whole proceedings were incorrect, and where serious

incorrect allegations of fact were made and believed-decision of the Appeal Board was made on those false presentations. The appeal board failed to notify the plaintiff, till seven months later of its decision, an event which could hardly have been written the contemplation of the U.S. Congress when it passed the act.

The very fact, that "I am a Negro, an Indian, and that my repeated application for the job, with outstanding credentials, practical experience, brought no results-at the same time, the people I know personally, who have the same credentials, got the jobs, at the Citibank" should trigger an investigation, a formal hearing-and not because of some fortuitous circumstances-event beyond the control of the plaintiff^{who} failed to meet some technical formalities, and the summary judgement be the answer.

With all humility, Plaintiff prays, that summary judgement be reversed, and hearing on the merits of the case be granted.

The defendant Citibank, to this day has refused to hire the plaintiff and the effect of this practice, has had a continuous, a painful effect on the psyche of the plaintiff.

Supreme Court's decisions, reversing the lower court's rulings on time period's statute, certainly bears great weight on the plaintiff's appeal.

Therefore, plaintiff requests, appeal to dismiss the summary judgement be granted.

Respectfully submitted,

Madan Gautam

Madan Gautam

Plaintiff, pro-se

May, 23, 1977